



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-30/52297

PRELIMINARY RECITALS

Pursuant to a petition filed January 31, 2002, under WI Stat § 49.45(5) and WI Admin Code § HA 3.03(1), to review a decision by the Kenosha County Dept. of Human Services in regards to Medical Assistance (MA), a hearing was held on May 1, 2002, at Kenosha, Wisconsin. A hearing set for March 26, 2002, was rescheduled at the petitioner's request.

The issue for determination is whether the county agency correctly computed the petitioner's divestment related penalty period.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Represented by:

John Maan De Kok

Phillips, Richards, Mayew & Corrigall, S.C.

P O Box 677

Kenosha, WI 53140-0677

Wisconsin Department of Health and Family Services

Division of Health Care Financing

1 West Wilson Street, Room 250

P.O. Box 309

Madison, WI 53707-0309

By: Roberta Bloner, ESS

Kenosha County Human Service Dept

8600 Sheridan Road

Kenosha, WI 53143

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren

Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Kenosha County. She received Institutional – MA during the period of December 1, 2000, through November 30, 2001.
2. On a date unknown in August, 2001, the petitioner and her spouse conveyed their homestead realty to their children for no compensation, retaining a life estate for each, i.e., conveying a life estate to themselves with a remainder interest to the grantee children. At that time, the value of

the realty was \$93,932. The petitioner was 71 at the time of this transfer. Her husband's age at that time is not known.

3. On November 30, 2001, the petitioner's Institutional - MA ended because she had not transferred her share of community property to her spouse, and the agency found she had assets in excess of MA Program limits. She did not file an appeal contesting this negative action.
4. On December 16, 2001, the petitioner's spouse died; shortly after his death, the petitioner applied for Institutional-MA, on December 21, 2001.
5. On or about January 14, 2002, the county agency determined that the petitioner had divested an asset in August, 2001; that divested asset was the remainder value to the remaindermen children/grantees, as derived "from" the life estate, based upon the petitioner's age was .41086, and that as a result, she had divested \$38,592.90 ($\$93,932 \times .41086 = \$38,592.90$). See, Exhibit #1.
6. The petitioner filed an appeal with the Division of Hearings & Appeals on January 31, 2002, contesting the divestment determination only.
7. On a date unknown subsequent, the county agency also determined that the petitioner had been overpaid \$11,574.14 in MA covered costs in the period of August 2001- November, 2001; but the petitioner did not file an appeal contesting this separate negative action.

DISCUSSION

When an individual, the individual's spouse, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA. WI Stat § 49.453(2)(b); WI Admin Code §HFS 103.065(4)(a); see also, MA Handbook, Appendix 14.2.1. Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is specified in WI Stat § 49.453(3), to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services (currently \$4,292). See, MA Handbook, Appendix 14.5.0.

The Department's policy also defines the property interests created, with respect to life estates and remainders, as follows:

When property is conveyed to one person for life (life estate holder) and to another person (the remainder man), both a life estate interest and a remainder interest are created. When the life estate holder dies, the remainder man holds full and unconditional title to the property and can dispose of it as s/he wishes (fee simple).

MA Handbook, Appendix 11.8.1.5 (10-01-01).

The petitioner's attorney concedes that a divestment occurred when the couple's homestead realty was transferred by deed to their children, retaining life estates for themselves. Rather, he contends the amount, and penalty period imposed, are unfair because the agency's reliance on the Life Estate & Remainder Interest table in the MA Handbook results in an inflated value of the remainder interest divested. See, Handbook, App. 30.2.0

Attorney Maan De Kok points out that the petitioner had, in fact, an undivided one-half interest in a *joint* life estate with her husband. (Note: Subsequent to transfer, (petitioner's spouse) died.) He argues that the remainder table process outlined by the Handbook's reliance on the table remainder value, which he presumes is the life estate remainder value for a solely held life estate interest, over-values her one person

interest. He also asserts that she only had a one-half interest in that joint life estate, so whatever its value, she should only be penalized for her half.

MA policy provides that after an institutionalized person becomes eligible for MA, she can transfer her homestead interest to her community spouse, who can then subsequently transfer it to anyone without affect on the institutionalized person's MA eligibility. See, MA Handbook, App. 14.4.0 (04-01-99). Put more simply, if the petitioner had conveyed all of her interest in the home to her husband during the first year of institutionalization, then he could have subsequently conveyed to any other without effect to her MA eligibility. Here, however, the petitioner failed to do so.

When the petitioner re-applied after her husband died, the county agency determined that she had divested the remainder interest derived from her life estate in the subject property, and multiplied the entire value of the property transferred in August, 2001, by the coefficient for the remainder interest found in aforesaid table for a person of her age at transfer, i.e., for a 71 year-old the listed value is .41086. When multiplied by the entire net property value at transfer of \$93,932, this meant the remainder interest divested was \$38,592.90. The agency cited to the MA Handbook, App. 14.10.0, "**Life Estates**" et. seq., in support of this computation. This section however, describes how to value a joint life estate when it is divested by conveyance to another, not how to value the remainder interest conveyed to another when life estates are "taken", or created, in a realty conveyance, with a remainder man identified.

I agree that the petitioner is right, in part. The process used here does not correctly determine the appropriate divested amount because App. 14.10.1 does not apply to this conveyance. However, the proffered argument that a "joint life estate table" must be available is also not correct. Attorney Maan De Kok offered no citation to law in support of his assertion that such an actuarial table must exist and would be a more accurate reflection of the proper divested sum. I have reviewed the state and federal law, and I cannot find the incorporation or reference to any such *joint* remainder interest table.

However, I am persuaded that a different computation method must be used to arrive at the correct divestment amount under federal law. The MA Handbook does not specifically address how to compute the amount divested to a remainder man in a conveyance that establishes life estates for *two* persons.

Under Wisconsin law, financial eligibility under the MA program (for "SSI-related MA") is to be the same as the income and asset requirements for the Supplemental Security Income (SSI) Program administered by the Social Security Administration. WI Stat § 49.47(4)(c). The federal SSI Policy & Operations Manual Series (POMS) is the basis for the Life Estate & Remainder Interest table in the MA Handbook, at App. 30.2.0, at p.2. This table is found in the POMS at § SSI 01140.120, which the Handbook incorporates by reference as the basis for its use, and which is authorized by federal regulation. See, 26 C.F.R. § 20.2031-7, 49 Fed. Reg. Vol. 49 No. 93/5-11-84. The POMS also provides as follows:

With the exception noted below, we assume, absent evidence to the contrary, that each owner of shared property owns only his or her fractional interest in the property. We divide the total value of the property among all of the owners in direct proportion to the ownership share held by each.

POMS at § SSI 01140.120.

A divestment occurs on the date the deed is signed. MA Handbook, App.14.2.2.1. The divested amount is the net fair market value of the divested asset minus the value received. MA Handbook, App.14.2.7. MA Handbook, App.14.2.2.1. Here, what was divested is the difference between the fair market value of the realty and the combined total value of the life estates retained by the couple. No other amount of value was retained by, or returned to, the couple in the conveyance. This calculation leaves the *total remainder interest* conveyed, and divested, by the couple to their children in August, 2001.

That amount so computed is really the inverse of the process for computing the value of a divested joint life estate interest stated in the Handbook at App. 14.10.1.

Here, the petitioner and spouse retained the life estates, not transferred them. They transferred the remainder interests each had in the jointly owned realty. MA law holds one responsible for transfers of assets made by the recipient or a spouse, for less than fair market value. This cannot be reduced to one-half when both acted to divest a large piece of the realty to their children. While a seductive argument, it is wrong. MA law holds her responsible for such divestment actions. See, WI Stat § 49.453(2).

The correct calculation should be performed as follows: Divide the market value by two owners. ($\$93,932 \div 2 = \$46,966$). Compute the life estate interests conveyed for each using the *life estate* coefficient (**not** the *remainder* coefficient!) in the Life Estate & Remainder Interest table for each spouse's age; add these resulting two life estate values together; and *subtract* this combined total from the fair market value at the time of the transfer to arrive at the amount of the divestment at that time. Then, impose the penalty period based upon this amount. For the petitioner, the value of her life estate was \$27,669 ($\$46,966 \times .58914$ [from the "life estate" column of the table] = \$27,669.54.)

I do not know the spouse's age at the time of the transfer, as it was not discussed in the hearing. If of a comparable age, the agency calculations may have actually *underestimated* the divestment event in August, 2001, not overestimated it. The matter will be remanded for the county agency to rescind the divestment determination and penalty period imposed here; compute the value of the deceased husband's life estate (using this same process) in August, 2001; add it to the petitioner's amount (\$27,669); and subtract the combined total from the \$93,932 fair market value to arrive at the net fair market value divested and the correct penalty period.

CONCLUSIONS OF LAW

The county agency has erred in determining the amount that the petitioner divested in August, 2001, because it misapplied MA Handbook App. 14.10.1 to this conveyance; insufficient information is present in the record to determine the correct divestment amount; the matter must be remanded for re-determination.

NOW, THEREFORE, it is

ORDERED

That the matter is remanded to the county agency with instructions to: rescind the divestment and related penalty period determination made on January 14, 2002; review and re-determine the amount of the petitioner's divestment by subtracting the combined total values of each life estate for the petitioner and her husband derived from each person's respective $\frac{1}{2}$ interest in the fair market value using the "life estate" coefficient for each from MA Handbook App. 30.2.0; with written notice. These actions shall be completed within 10 days of the date of this Decision.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 21st day of
May, 2002

/sKenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals
71/KDD